In the High Court of Judicature for Rajasthan

Jaipur Bench

**

Cr. Misc. Petition No.1320/1998
Smt. Raj Kunwar Kalani & Rekha Kalani
Versus State & Anr.

Date of Order ::: 01/10/07

Hon'ble Mr. Justice Ajay Rastogi

Mr. Alok Sharma, for petitioners
Mr. Arun Sharma, Public Prosecutor for State.

Instant Misc. Petition U/s 482 CrPC is directed against taking cognizance of offence U/Ss 27(b)(i) & 27(d), 27(c) for contravention of provisions in Ss. 18(a)(i), 18(a)(vi), 18(b) read with S.16(i)(a), 17(b), 17-A(a) of Drugs & Cosmetics Act, 1940 (“**the Act**”) vide order dt. 30/05/1991 and summoning petitioners (accused No. 4 & 6) in Cr. Case No.84/91 pending before Chief Judl. Mag. Sikar.

Petitioner Nos.1 & 2 (accused No.4 & 6 in complaint) are partners of M/s Jaipur Pharmaceuticals Works, 22 Godam, Industrial Estate, Jaipur (accused No.8) (“**Firm**”), engaged in manufacturing of drugs and medicines.

Vide letter dt.26/07/88, Medical Officer (Store), Shri Kalyan Hospital, Sikar reported to Chief Medical & Health Officer, Sikar that

injection “Dexamethasone” manufactured by Firm (accused No.8) bearing batch No.106/88/ manufacturing month January, 1988 & expiry date December, 1989 which was supplied to the Hospital and after supply to Hospital's Wards on 26/07/88, 44 vials of such injection in its stock were found having change in its original colour besides seemingly infected by fungus. This letter was endorsed to Drugs Inspector who after inquiry prepared his report dt.28/07/88 in the presence of Medical Officer, ibid, and all 44 vials of aforesaid injection were seized and divided in four equal parts in the form of its sample and thereafter sealed in accordance with Rules – one sample whereof was sent for analysis to the Director Central Drugs Laboratory Calcutta, who in its report dt.18/12/89 opined that sample was yellow coloured liquid containing large numberof suspended articles visible in ordinary day light with unaided eyes and thus is not of standard quality and does not confirm to claim in respect of “Dexamethasone phosphate” content - a copy whereof alongwith one sample vide show cause notice dt.24/04/90 was sent by Drugs Inspector & delivered to Manager of accused No.3 (Govt. Medical Store) on 23/05/90.

After obtaining written sanction from competent authority vide letter dt.31/03/90, Drugs Inspector filed complaint on 28/05/91 for prosecution against petitioners as well as other accused for offences (supra). However, complaint was registered and learned Magistrate took cognizance of offences (supra) and issued process against petitioners (accused No.4 &6) and other accused vide order dt.30/05/91. Hence this petition.

Only contention advanced by Counsel for petitioners is that there is no whisper in the complaint against petitioners as to how and in what manner they were in-charge of and responsible for conduct of business of the manufacturing Firm (accused No.8) at the time of commission of alleged offences, and in absence of necessary ingredient as contemplated in S.34(1) of the Act being disclosed in complaint, itself, a vague reference of responsibility is not a sufficient compliance of mandatory requirement U/s 34 of the Act; therefore, very cognizance taken of offences (supra) against petitioners vide order impugned is not legally sustainable. In support, Counsel placed reliance upon decision of Apex Court in **Municipal Corpn Delhi Vs. Ram**

K.Rohtagi (AIR 1983 SC 67); State of Haryana Vs. Brijlal Mittal (AIR 1998 SC 2327) and of this Court **in Bharat Insecticides Ltd Vs. State of Rajasthan (1996 (1)RLR 349) and M/s Cadila Health Care Ltd Vs. State (DB) (2007(1) RLR 389).**

Public Prosecutor supported the order impugned and submits that petitioners are partners of Firm (accused No.8) and as per partnership deed placed on record, all the three partners are having three equal shares; therefore, they are directly in charge and responsible to the manufacturing Firm for conduct of its business - in support whereof, specific averments have been made with regard to petitioners in para 2 of the complaint which is sufficient compliance of the Act and that apart, all these objections raised herein can be agitated in course of trial and since complaint discloses commission of offence, summons have rightly been issued to the offenders and during trial they will get opportunity to satisfy the Court about act of commission of offences alleged against them; and as such no error has been committed while taking cognizance impugned and this petition deserves to be dismissed.

I have considered contention of Counsel for both the parties and with their assistance examined material on record. It is true that proceedings against accused at initial stage is ordinarily not to be interfered with but if on the face of complaint which lacks of material particulars for commission of offence under the Act, the Court should not be hesitant to invoke powers U/s 482, CrPC.

In the complaint, facts have been disclosed that petitioners are partners of manufacturing Firm (accused No.8) and sample sent to the Central Laboratory Calcutta for analysis was found to be misbranded and its analysis report was sent to the accused named in the complaint who are alleged to have controverted the report, as well and as per S.25(3) of the Act, referee sample was got re-tested by Central Laboratory before expiry of shelf life of the sample.

S.34 spells out that for commission of offences alleged against Companies/Firms, every person was in charge of or responsible for the Company/Firm for conduct of its business, as well as the Company/Firm shall be deemed to be guilty of offence and that being so, S.34(2) further

clarifies that it has to be proved that offence has been committed with the consent or connivance which can be attributable to any neglect on the part of Director/Manager, Secretary or other person of Company/Firm, who can alone be prosecuted and punished.

In instant case, only fact referred to in the complaint with regard to act of instant petitioners which may show about they being either in charge of or responsible to the Firm for conduct of its business, as required by S.34 of the Act is reproduced from page 9 sub-para 2 ad infra:

> "**(2)**- अभियुक्त सं0 4 से 6 अभियुक्त फर्म 8 में भागीदार है जो कि अवमनक कोटि की औषधि का निर्माण विक्रय एवं बेचने वितरण कराने के समान रूप से जिम्मेदार है "

For criminal liability, penal action must be strictly construed and there is no vicarious liability in criminal law unless statute takes that also within its fold. S.34 of the Act deals with offences by Companies/Firms but does not make all of its Directors/Partners liable for commission of offence alleged against Company/ Firm merely because of their holding office of Directors/Partners or in other capacity.

As regards law on the ground urged at the bar, it stands settled by virtue of decision of Apex Court in **State of Haryana Vs. Brijlal Mittal (supra) Apex Court** observed :

> "It is thus seen that the vicarious liability of a person for being prosecuted for an offence committed under the Act by a company arises if at the material time he was in-charge of and was also responsible to the company for the conduct of its business. Simply because a person is a director of the company it does not necessarily mean that he fulfills both the above requirements so as to make him liable. Conversely, without being a director a person can be in-charge of and responsible to the company for the conduct of its business. From the complaint in question we, however, find that except a baid statement that the respondents were directors of the manufacturers, there is no other allegation to indicate, even prima facie, that they were in-charge of the company and also responsible to the company for the conduct of its business."

In **M/s Cadila Health Care Ltd Vs. State (supra**) this Court (DB) observed while examining scope of S.34 of the Act ad infra: -

> **"21.** The crucial test which has been laid down by the Hon'ble Supreme Court on the issue of Director being 'in charge of' & 'responsible to the company for the conduct of business of the company' as required under section 34 of the Act is that the Director is concerned with the day-to-day working of the company, or in other words, for over-all control of the day-to-day business of the company or firm which excludes Directors connected with policy of the company. The Director may not be in charge of business of the company or may be in charge of business of the company but not over all in charge or may be in charge of only some part of business and further test as regards averments/ allegations made in the complaint, the Supreme Court had laid down that words mentioned in the section are not the magic words but the substance of the allegations be read as a whole. "

In view of what has been observed (supra), very complaint filed against petitioners in instant case is not sustainable in the eye of law as it completely lacks material particulars as required U/s 34 of the Act and on a perusal of entire complaint, there is no iota of allegation in the complaint which may disclose about petitioners being 'in-charge of' and 'responsible for the

conduct of business of the Company/manufacturing Firm (accused No.8) for day-to day or having over-all control over its business in order to make them vicariously liable for commission of offence and except a vague statement that they are partners of the manufacturer, there is no allegation which may prima facie indicate that they were in-charge of or responsible to the Company for conduct of its business. Material disclosed in instant complaint does not create any such vicarious liability qua petitioners. Hence order of Magistrate taking cognizance of offence and issuing process for summoning petitioners is of no legal significance and in such circumstances, to prosecute the petitioners in instant case will be nothing but an abuse of process of law.

Although this Court has set aside the order impugned but would like to point out that Section 319, CrPC certainly empowers the Court to take cognizance against persons not being the accused before it and try them along with other accused already standing at trial, in case prosecution can at any stage produce evidence satisfying the Court that the other accused or those who have not been arrayed as accused

against whom proceedings have been quashed have also committed the offence, at that stage the Court can take cognizance against them and try them along with the other accused as has been observed by Apex Court in **Municipal Corp. Delhi vs. Ram Kishan Rohtagi (1983 (1) SCC 1**) ad infra:

> "**19.**In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence the Court can take cognizance against them and try them along with the other accused. But, we would hasten to add that this is really an extra ordinary power which is conferred on the Court and should be used very sparingly and only if compelling reasons exist for taking cognizance against the other person against whom action has not been taken. More than this we would not like to say any thing further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondent Nos.2 to 5 will not prevent the court from exercising its

> discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

Consequently, misc. petition succeeds and is hereby allowed. Complaint and further proceedings qua petitioners (accused No.4 & 6 in complaint) initiated vide order dt.30/05/91 of Chief Judl. Mag. Sikar are quashed and set aside. However, in the light of what has been observed (supra), this Court makes it clear that merely proceedings have been quashed against petitioners will not prevent the trial Court from exercising its discretion U/s 319, CrPC, if it is fully satisfied that a case for taking cognizance against them has been made out on additional evidence led before it in course of trial.

Record be sent back forthwith to the court below to proceed further in accordance with law and expedite trial keeping in view its long pendency.

(**Ajay Rastogi), J.**

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